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In The

# Supreme Court of the United States

October Term, 1980

No. 80 _____

THE UNITED STATES OF AMERICA,
*Respondents*

*v.*

GEORGE ANDERSON,
*Petitioner*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## Questions presented

1. Whether that portion of the income of a noncompetent Indian cattle rancher allocated to the seasonal grazing of his cattle under grazing permits on tribal grazing units of tribal and allotted trust land is subject to Federal Income Tax?
2. Whether tax exemptions of Indian income derived directly from Indian trust lands must be found in express exemptive language in a statute or treaty or whether they may be found by implication in Federal Indian policies and programs, in various Federal statutes and in long standing implementation and administrative interpretation thereof?
3. Whether Federal income taxation of income derived from the trust land of others by an noncompetent Indian is encumbrance of that trust land within the meaning of the General Allotment Act of February 8, 1887, 24 Stat. 388; the Fort Peck Allotment Act of May 30, 1908, 35 Stat. 558; the Indian Reorganization Act of June 18, 1934, 48 Stat. 984; the Federal Regulations which sprang from the Indian Reorganization Act as found in 25 CFR §151 and following; and the General Congressional and Federal Policy of the United States towards its Indian wards?
4. Whether the taxation of a noncompetent Indian's income derived from cattle ranching and grazing units of tribal trust land other than his own is unconstitutional and a violation of the equal protection clause of the 5th Amendment?

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## Parties to this Proceeding

United States of America, Plaintiff-Appellant; and George Anderson, Defendant-Appellee, who is the Petitioner to the United States Supreme Court.

## Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 625 F. 2d 910. (See Appendix A) The opinion of the District Court of Montana appears at 442 F. Supp. 10 (see Appendix B).

## Statement of Jurisdiction

The judgment reversing the District Court's summary judgment was entered on August 21, 1980. A timely petition for rehearing was denied by an order dated October 27, 1980. This Court's jurisdiction is invoked under 28 USC § 1254 (1).

## Constitutional Provisions, Treaties, Statutes Ordinances and Regulations

The following statutes and regulations are reproduced as appendices:

(1) General Allotment Act of February 8, 1887, 24 Stat. 338. (Appendix C)

(2) Allotment Act of Fort Peck Indian Reservation of Montana, Act of May 30, 1908, 35 Stat. 558. (Appendix D)

(3) Indian Reorganization Act of June 18, 1934, 48 Stat. 984. (Appendix E)

(4) General Grazing Regulations for Indian Reservations, 25 CFR § 151.1 through §151.7 (Appendix F)

The constitutional provision involved is the 5th Amendment to the United States Constitution which in pertinent part provides:

> "No person shall be ***deprived of life, liberty or property, without due process of law;***."

## Statement of the Case

Defendant George Anderson is a noncompetent Sioux Indian and an enrolled member of the Fort Peck Indian Tribes of Montana. Mr. Anderson is a rancher by occupation and all of his ranching operations are conducted and the income therefrom, if any, derived entirely within the boundaries of the Fort Peck Indian Reservation.

Anderson is the beneficial owner as allottee of a 316.24 acres of trust land, and is also the grantee by deed of the beneficial ownership of 320.40 acres of land originally allotted another Indian. The Government concedes that Anderson's income from these lands is exempt from Federal Income Tax.

Anderson is also the holder of a grazing permit allowing him to graze his cattle on Range Unit No. 122 within the Fort Peck Indian Reservation. This Range Unit, for the taxable years pertinent to this case, consisted of approximately 4,160 acres of land beneficially owned by some 17 Indian allottees, and of approximately 640 acres beneficially owned by the Tribe. All of this land is held in trust by the United States for the use and benefit of the allottees or the tribe. This range unit was established by the tribe pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 USC § 461-479; namely 25 CFR § 151.1 and following; and a land use program adopted and implemented by the Fort Peck Tribes for the benefit of tribal members.[1]

1. The Fort Peck Reservation has large areas of semi-arid marginal lands useful only for the grazing of livestock. In order to utilize this land for the benefit of its members, the Tribe adopted a land use program whereby these lands are divided into grazing units. These grazing units are made available to tribal cattlemen, such as Anderson, who receive permits to graze their cattle throughout the grazing season. The permit holder pays a small amount per head per grazing season. Thus a tribal cattle member can stretch the capacity of his home base of

The taxable years pertinent to this case are 1960 through 1966. During the grazing seasons of these years (May 1 through October 31), Anderson's cattle were kept on the grazing unit. At the conclusion of the grazing season, the cattle were returned to the land granted to Anderson by allotment and by deed. This litigation arose as a consequence of the Government's attempt to tax whatever income Anderson may have derived from the use of the grazing unit.

On January 6, 1975, the United States filed suit praying that the Defendant be adjudged delinquent in his income taxes in the amount of $139,999.87, including penalty and interest, and that certain tax liens against the property be declared valid, and that the liens be foreclosed. Finally, the Government sought judgment for any deficiency.[2]

allotted lands so that his allotted lands plus the grazing unit will become an economic farm unit. It would seem that several cattlemen can hold simultaneous permits on the grazing unit as long as the grazing capacity of the land will sustain more than one permit holder. The purpose of such grazing units is to promote the use of lands by Indians and enable them to earn a living and at the same time provide the highest yield for the tribe and other trust allotment holders. 25 CRF § 151.3 (See Appendix F)

2. The total amount of tax in its yearly computation can be found in the District Court opinion, Footnote 1, Appendix B. Seemingly, the Internal Revenue Service computed profit for a year, allocated 6.2% of the profit to defendant's own allotted fee acreage, and 93.8% to the lands of the grazing units. The Internal Revenue Service then taxed them 93.8%. Because Anderson believed the income to be exempt, he filed no Income Tax Returns for the years in question. For example, in 1966, the Internal Revenue Service determined through its own computations that Anderson had a gross income of $89,940.00 and a net taxable income of $59,055.00. The Internal Revenue Service ignored the fact that the grazing season on the unit was from May 1 to October 31, or just six months. Thus, an abnormally high degree of profit

The case was tried in the United States District Court of the District of Montana, 442 F. Supp. 10. The basis for Federal Court jurisdiction was 28 USC § 1340, 1345. Chief Judge James F. Battin ruled on summary judgment that the income allocable to profit made from grazing on grazing units of trust lands was not subject to Federal Income Taxation. The Court ruled so based on its reading of *Squire v. Capoeman*, 351 US 1 (1956), that if Congress and the Department of the Interior are to reach their goals of optimum Indian land use and eventual economic independence, income tax laws are not to impede those Federal objectives.

The Government appealed the District Court's summary judgment and the Ninth Circuit Court reversed and remanded. The Circuit Court, in a split decision, ruled that since there was no express exemptive language in a statute or treaty, Anderson's income from the grazing unit was taxable. The Court further added a tax exemption could not be based on general federal policy toward Indian land use. Finally, the Court rejected Anderson's claim that any such tax would be violative of the equal protection component of the 5th Amendment's due process clause. The Court reasoned that the rational relation test was applicable and met by the United States Government.

Judge Ferguson dissented, realizing that the result reached would hinder the Federal Policy towards Indians. (The majority readily admitted the debilitating effect of this decision on Federal Policy). Judge Ferguson disagreed with the majority's demand for express exemptive language. He stated that Courts must interpret Federal

was allocated to the grazing unit. Also, Anderson could not have possibily had a 64% profit as the Internal Revenue Service alleges. The figures which the Internal Revenue Service arrived at in computing both the net profit and that profit allocable to the grazing unit are arbitrary.

statutes and policies in a manner which does not thwart the intent of Congress, and the majority's failure to exempt Anderson's income from federal taxation did thwart the intent of Congress.

**Argument**

Petitioner believes that the United States Supreme Court should grant a writ of certiorari in this case because the Ninth Circuit has decided an important question of Federal law which has not been, but should be settled, by the United States Supreme Court. Furthermore, the Ninth Circuit has decided the same in conflict with *Squire v. Capoeman*, 351 US 1 (1956), and with Congressional intent as developed and embodied in Congressional statutes and Department of Interior policy.

**I. The Majority's Opinion Applied An Erroneous Rule Of Construction With Regard To Indian Tax Exemptions, Which Rule Conflicts With Applicable United States Supreme Court Decisions.**

The Ninth Circuit has based its rulings in this case on its conclusion that tax exemptions *with respect to Indian income derived directly from trust lands* must be found in "express exemptive language" in a statute or treaty. *United States v. Anderson*, 625 F. 2d 910,913 (1980). This conclusion is erroneous since it is contrary to the consistent holdings of the Supreme Court that such Indian tax exemptions must be found unless Congress legislates otherwise. The Court in *Carpenter v. Shaw*, 280 U.S. 363, 366-7, (1930) held that

> "While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, . . . the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the government."

The rule of construction of the Ninth Circuit that "express exemptive language" in a statute or treaty must

be found before trust lands can be exempted from Federal taxation, was repudiated by the Supreme Court in *Squire v. Capoeman*, 351 U.S. 1 (1956). The United States Supreme Court accepted certiorari in *Capoeman* after a split between the Tenth and Ninth Circuits. In *Jones v. Taunah*, 186 F. 2d 445 (C.A. 10, 1951) Cert. denied 341 U.S. 904, the Tenth Circuit held that the income derived by an Indian from his restricted allotted lands was subject to Federal Income Tax in the absence of statutory provisions specifically exempting such lands from Federal taxation. The Court stated that exemptions from Federal taxation cannot rest upon implication.

The Ninth Circuit decision, *Squire v. Capoeman*, 220 F. 2d 349 (C.A. 9, 1955), dealing with almost identical tax issues and facts, held the opposite, specifically recognizing and specifically rejecting the Tenth Circuit decision of *Jones v. Taunah*.

The United States Supreme Court, on review of *Squire v. Capoeman*, 351 U.S. 1 (1956) held that a non-competent Indian's income from the sale of timber harvested from trust land allotted to him was not subject to Federal Income Tax. The Court found such exemption to be, in the Court's words, *implied* by the provisions of the General Allotment Act of 1887, Ch. 119, 224 Stat. 388, 25 USC § 331 and following, which required that the Government ultimately convey the allotted land to the Indian "free of all charge or incumbrance whatsoever." *Squire v. Capoeman, Supra* at 7-8. The Court in *Capoeman* held that this implied tax exemption had its foundation in the Act's policy of helping the Indians to become economically self sufficient. *Squire v. Capoeman* at 9-10. In reaching its decision, the Court's reliance upon a rule of construction favoring implied tax exemptions in cases of this nature was made obvious by its citation with approval of the United States Attorney

General's opinion (34 Op. Atty. Gen. 439, 449, 1925) that he was

> "(u)nable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the Nation. . .in other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the Guardian."

*Squire v. Capoeman Supra* at 8.

The Ninth Circuit followed the mandate that tax exemptions of *Indian income derived directly from the use of trust land* be found by *implication* in *Stevens v. Commissioner*, 452 F. 2d 741 (C.A. 9, 1971). The Court held that the tax exemption also applied to the income from trust lands which the Indian had acquired through gift, inheritance or purchase from other Indians. The Court stated at 744:

> "*Capoeman* is not a technical or narrow decision; nor is its holding limited to capital gains taxes. Rather the Court found implicit in section 5 and the amendment to section 6 of the General Allotment Act a 'congressional intent *to subject an Indian allotment to all taxes only after* a patent in fee is issued to the allottee!"(emphasis ours)

The Ninth Circuit in *Stevens* held the lands to be tax exempt even though the Fort Belnap Allotment Act, which applied to the trust lands involved in the *Stevens* case, did not contain the "free of incumbrance" language of the General Allotment Act. The Court, at 744, stated that Congressional intent was to be found by implication:

> "Federal Policy toward particular Indian tribes is often manifested through a combination of general

laws, special acts, treaties, and executive orders. All must be construed in *pari materia* in ascertaining congressional intent. *Kirkwood v. Arenas*, 9 Cir. 1957, 243 F. 2d 863, 867."

The Ninth Circuit in *United States v. Anderson* deviates from the rule that Indian tax exemptions are to be found by implication. The Court, in its majority opinion, cites *Commissioner v. Walker*, 326 F. 2d 216 (C.A. 9, 1964), *Choteau v. Burnet*, 283 U.S. 691 (1931), and *Fry v. United States*, 557 F. 2d 646 (C.A. 9, 1977) for the proposition that Indian tax emexptions may not be found by implication. These cases are totally distinguishable from the case at bar. The *Walker* case involved the issue of the taxability of an Indian's wages earned while acting as tribal treasurer. The *Choteau* case concerned the issue of the taxability of the income of a *competent* Indian. The *Fry* case involved the issue of the taxability of income earned by Indians hired as subcontractors to conduct logging operations on the reservation for a *non-Indian* logging company. The Ninth Circuit admitted in the *Fry* case that the subject income was not derived directly from the trust land but from a contract entered into by the Indians with the non-Indian logging firm. *Fry v. United States, Supra* at 648. Hence none of these cases involved the taxability of a *noncompetent Indian's income earned directly from trust land*, and such cases are therefore distinguishable from the instant case.

It must be noted that any dicta in such cases as *Walker, Fry* and *Holt v. Commissioner*, 364 F. 2d 38 (C.A. 8, 1966) to the effect that express exemptions must be found for Indian income derived directly from trust land are not only inconsistent with the Supreme Court's holding in *Squire v. Capoeman*, 351 U.S. 1, but are the statements of the Courts and *not* Congress. Hence, it is inherently the province of the *Courts*, not Congress, to

correct this improper erosion of the rule of construction concerning such Indian tax exemptions. Consequently, the majority's conclusion that Anderson must address his arguments to Congress, not to the Court's (*United States v. Anderson, Supra* at 917) is erroneous since it is the Courts' responsibility to apply the proper rule of construction with respect to Indian tax exemptions arising from the use of trust lands.

**II. Explicit Congressional And Federal Policy Dictates That Anderson's Income Is Tax Exempt.**

Given the proper rule of construction that tax exemptions concerning a noncompetent Indian's income derived directly from the use of trust land are to be found by implication, it is clear that such tax exemptions must be bottomed on Congressional and federal policy and not simply on the express words of a statute or treaty. Thus the Supreme Court in *Squire v. Capoeman,* 351 U.S. 1, *Supra,* recognized that it was necessary to "preserve" all of the Indian's income from his trust land in order to carry out the "purpose of the allotment system" under the General Allotment Act, 24 Stat. 388, 25 USC §331 and following, which was "to protect the Indians" interest and "to prepare the Indians to take their place as independent qualified members of the modern body politic."

Further, in *Stevens v. Commissioner,* 452 F. 2d 741, *Supra,* the Ninth Circuit found the tax exemption to exist, despite the absence of the General Allotment Act's "free of incumbrance" language, because of the fact that federal policy towards Indians is often manifested through a series of acts, statutes, treaties and executive orders, and that "all" of these "must be construed in *pari materia* in ascertaining Congressional intent". *Stevens v. Commissioner, supra,* 452 F. 2d at 744.

As the majority opinion in *United States v. Anderson,* 625 F. 2d 910, 912, notes, the General Allotment Act

failed miserably to carry out its purpose in making the Indians economically self sufficient through their assimilation into white society. To remedy this situation, Congress passed the Indian Reorganization Act of 1934, 48 Stat. 984, 25 USC §461-479 (hereinafter referred to as "IRA"). The IRA sought to make Indians economically self sufficient through the consolidated use of Indian trust land. The IRA thus terminated the allotment process, extended the trust period indefinitely, and encouraged the tribes to preserve and utilize their land for the benefit of the individual tribal members. Thus under the IRA, Indian trust land, instead of being divided into allotments, was to be divided into range grazing units, allowing tribal members to use such by permits issued on a temporary basis. Such economic units would replace the allotment as the means by which the individual Indian would achieve economic self reliance.

The then Commissioner of Indian Affairs, John Collier, in his written statement of support for the IRA ("The Purpose and Operation of the Wheeler-Howard Indian Rights Bill" as reported in Senate Report 2755, 73rd Congress, 2nd Session, February 27, 1934) evaluated the IRA as a very positive step for the tribes. After stating that the IRA would not take anything from the tribes but would only add to the property and the advantages of such tribes, he went on to discuss the positive aspects the IRA would have:

> "The bill seeks to establish the legal conditions through which the Indian will be released from economic and social imprisonment and will begin to work out a real destiny in America.
>
> It provides him with economic security against the wastage of his assets.
>
> It provides him with a workable plan of land management and development whereby he can

achieve economic independence.

It promotes his individual enterprise in farming, livestock growing, and other forms of land use. Community land ownership, where established, will be a means to prevent land alienation and to secure economic land use; but the use of the land will remain primarily individual.

**********

The consolidation of Indian lands, made possible by the bill, will not be an instrument of isolation, but an indispensable means of putting Indian lands (especially forest and grazing land) into units for profitable and conservative management. The land program of the bill fits in closely with the larger program of intelligent land use for white-owned and public-domain lands now being worked out by this administration. In no sense does it imply exclusion from, or lack of contact with, the white world. *It makes possible at least a modest competition of Indians with their white neighbors* in place of the inferiority status which economic and social disintegration has forced on so many Indians.

Having thus determined the extent of the interests of the various individual Indians, Title III, Sec. 9, authorizes the Secretary to make assignments of land according to the extent of such individual interest. Since land can be used in small individual units for farming and domestic purposes without destroying the economic unit, the Secretary may assign to individuals the right of exclusive occupancy of such units. . . In brief, grazing units will be enjoyed in common by large groups.

*Section 16 proclaims exemption of all lands from taxation."*(emphasis applied)

Let us briefly recapitulate the Congressional purpose and intent underlying the IRA. The Act was intended to remedy the disastrous effects of the General Allotment Act by curtailing the allotment system, by withdrawing unallotted reservation land from entry and settlement by white men, by the purchase of additional land for reservations, and by encouraging a consolidated and community-controlled use of reservation land by individuals of the tribe. Congress, and the Department of the Interior through the voice of Commissioner Collier, felt that the foregoing provisions would make "possible at least a modest competition of Indians with their white neighbors". This ability to compete was to be enhanced through the exemption of *all* Indian lands from taxation.

The Ninth Circuit in *Stevens v. Commissioner, Supra,* correctly adhered to the reasoning of the Supreme Court in *Squire v. Capoeman* by holding that the economic units (in our case, grazing units) must be construed in *pari materia* with allotments under the General Allotment Act. Just as the income from the allotment was ruled to be tax exempt in furtherance of Congressional policy underlying the allotment system, *Squire v. Capoeman, Supra* at 9, so must the income derived from economic units under the IRA be ruled tax exempt pursuant to the same basic Congressional policy.

In the instant case, Anderson's income was derived from a grazing unit established by the Fort Peck Tribes pursuant to Section 6 of the IRA. The majority opinion of the Ninth Circuit failed to consider Anderson's grazing unit in *pari materia* with the tax exempt allotments established under the General Allotment Act. In this respect, the majority is in error.

It is essential to note that officials of the Department of the Interior, including then Commissioner of Indian Affairs John Collier, prior to the enactment of the IRA, gave both Congress and the Indians assurances such as that "all" the "lands" governed by the act would be

exempt from taxation, and that the tax free period confirmed by the General Allotment Act would be "continued indefinitely" under the IRA (see discussion above). As the Agency charged with the administration of Indian laws and responsible for drafting many of them, Interior's interpretation is entitled to "great weight" and "is not to be overturned unless clearly wrong. . . ." *United States v. Jackson*, 280 U.S. 183 (1930); *Stevens v. Commissioner, Supra.*

The majority opinion of the Ninth Circuit in the instant case (at 915, footnote 8) attempts to sidestep Interior's interpretation arguing that such statements do not constitute an administrative interpretation of the act as finally passed. However, it is clear that the Department of the Interior adheres to the same interpretation of the IRA even to the present day. Thus, as quoted by the Ninth Circuit in *Stevens v. Commissioner, Supra,* at 746 (1972) the Department "makes no distinction between the trusts which were established pursuant to the General Allotment Act of 1887 and those established pursuant to the Indian Reorganization Act of 1934," and in *United States v. Critzer,* 498 F. 2d 1160, 1161 and 1162 (C.A. 4, 1974) the Court noted Interior's interpretation that economic units in the form of possessory holdings established pursuant to the IRA are tax exempt to the same extent as trust and restricted allotments.

In a later proceeding of the same case, the Court of Claims in *Critzer v. United States,* 597 F. 2d 708 (Ct. Cl., 1975), review denied___U.S.____,100 S.Ct. 239 (1979), analyzed the taxability of possessory holdings under the IRA. Critzer, an enrolled member of the tribe, operated a motel, restaurant, gift shop, etc. on a possessory holding. A possessory holding is an exclusive right to use land being held in trust by the Eastern Brand of Cherokees. The land was not allotted as the IRA was passed before any allotments of tribal land were made, precluding allotments. After an analysis of *Capoeman,*

the Court denied a tax exemption for income derived from the businesses stating that *Capoeman* holds that income is tax exempt if it is *directly derived from the land.* The Court ruled that Amy Critzer was deriving her income from improvements and business activities. However, by doing so, the Court reasserted the rule that income directly derived from economic units of land established under the IRA is exempt from taxation.

**III. Although Expressed Statutory Language Of Exemption Is Not Necessary Here, Section 16 Of The IRA Provides Such Language.**

In light of the rule of construction that Indian tax exemptions in cases involving income arising directly from the use of trust land are to be found by implication, and in light of the explicit Federal and Congressional policy which is at odds with the taxation of income derived from grazing units established pursuant to the IRA, it is clear that expressed statutory or treaty language need not be sought to support the tax exemption of Anderson's income. However, even if such expressed language were necessary, Section 16 of the IRA can provide the expressed exemption. Section 16 provides:

> "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers. . . *to prevent the sale disposition, lease, or encumbrance of tribal lands, interests in, or other tribal assets without the consent of the tribe.*". (emphasis applied)

25 USC, Sec. 476.

The tribes' power under Section 16 to prevent the "encumbrance" or other disposition of tribal lands and assets should be construed under *Stevens v. Commissioner, Supra,* in *pari materia* with the General Allotment

Act's provision that the allotments would ultimately be conveyed "free of all charge or incumbrance" to the Indian. Thus Section 16's language creates a tax exemption just as did the comparable language of the General Allotment Act as construed in *Squire v. Capoeman, Supra.*

The majority opinion of the Ninth Circuit decision argues that Section 16 must be construed restrictively such that its language cannot be considered to confer tax exemption. Such a restrictive reading is contrary to the fundamental rule that in legislation and treaties dealing with Indians,

> "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than one hundred years, and has been applied in tax cases."

*Choate v. Trapp,* 224 U.S. 665 (1911). Cited with approval in *United States v. Santa Fe Railroad Company,* 314 U.S. 339 (1941); *Antoine v. Washington,* 422 U.S. 373 (1975); *Bryan v. Itasca County, Minnesota,* 426 U.S. 373 (1976); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

The majority opinion of the Ninth Circuit, *Supra* at 916, also concludes that Section 16 of the IRA is not applicable to the Fort Peck Tribes since the tribes in 1934 voted against application of the IRA. However, Section 16 was merely a confirmation of existing law at the time of its enactment. The Fort Peck Tribes, as a quasi-sovereign entity, in 1934 already possessed the powers enumerated in Section 16 with respect to its reservation land. Such powers were implicitly *reserved* to the tribes

when in 1886 they entered into a treaty with the United States and agreed to restrict their livelihood and quasi-sovereign status to the Fort Peck Reservation. 25 Stat. 113. Thus, the tribes have adopted a constitution which has been approved by the Secretary of Interior pursuant to the same Section 16. This constitution purposely implements the intent and provisions of the IRA in its entirety. Finally, Anderson was issued a grazing permit pursuant to 25 CFR Sec. 151.1 and following. As stated above, these regulations are authorized by and bottomed on the IRA, Sec. 6, 25 USC 466.

A three judge District Court concluded that the election requirement of Section 18 of the IRA, 25 USC Sec. 478, was to affect only Section 16 and 17, 25 USC. 476 and 477, and that a vote against those provisions would not affect the remainder of the IRA. *Morton v. Mancari*, 359 F. Supp. 585, 588 (D.N.M.,1973), reversed on other grounds, 417 U.S. 535. The Court was discussing the applicability of the Indian preference portion of the Act, 25 USC Sec. 472. Petitioner asserts that the election requirement of Section 18, 25 USC Sec. 478 can reasonably be limited to the tribal organization provisions of Section 16 and 17, 25 USC Sec. 476 and 477 and not inclusive of the powers listed in the second half of Section 16, 25 USC Sec. 476. As stated above, all of the powers enumerated in the second paragraph of Section 16, 25 USC Sec. 476 with respect to the tribe's reservation land were already possessed by the tribe. Finally, Section 6 of the Act, 25 USC Sec. 466, is still applicable to the Fort Peck Tribe under the rationale of *Morton v. Mancari*. The resulting regulations are 25 CFR Sec. 151.1 and following.

We believe that Judge Battin correctly phrased the Federal policy and its impact on taxation when he stated:

> "However, the Court is convinced that a full effectuation of Federal Indian land use policies requires

that income derived from grazing units be free from tax.

> The inefficient use of Indian lands under the Allotment Act was one of the major concerns of Congress in enacting subsequent legislation. This concern is reflected in the heavy emphasis on land use in the Reorganization Act and in the regulations promulgated thereunder by the Secretary of Interior. It is clear that the Federal Government, specifically the Congress and the Department of the Interior, are most concerned about promoting optimum Indian land use and eventual economic independence."

*United States v. Anderson*, 442 F. Supp. 10, 13 (1977).

Judge Battin correctly viewed Federal Indian policy in its broadest context.

> "As the Court noted in *Squire*, '(i)t is unreasonable to infer that, in enacting the Income Tax Law, Congress intended to limit or undermine the Governments' undertaking. 351 U.S. at 10, 76 S.Ct. at 617. The Court will not draw such an inference in this case. The taxation of income from grazing permits impedes the achievement of the Government's land use objectives. The Court therefore concludes that such income is tax exempt."

*United States v. Anderson, Supra.*

**IV. Taxation Of Anderson Income Here Is A Violation Of The Equal Protection Component Of The Fifth Amendment.**

The majority opinion (*Supra* at 917) notes that Anderson has argued that if his income in question is held to be subject to Federal Income Taxation, such tax is unconstitutional as a violation of the equal protection component of the Fifth Amendment. Such taxation would result in differing treatment of the following classes:

(1) noncompetent Indians who buy the equitable fee to land held in trust for other Indians (that income from such land is nontaxable under *Stevens v. Commissioner, Supra*), and (2) noncompetent Indians who buy licenses to use land which is held in trust for others (taxable). Also treated differently in such case would be (1) noncompetent Indians who derive income from their own trust land (such income is nontaxable under *Squire v. Capoeman, Supra*) and (2) noncompetent Indians who derive income from land held in trust for others (taxable).

The majority's opinion states that equal protection is not violated by such differing treatment because Congress could "rationally" want to help Indians by exempting them from tax on income derived from their own trust land, but refuse to extend the additional benefit of allowing them to market the advantage of tax exemptions to others while still retaining the equitable fee in the land.

How can such differing treatment possibly be termed "rational" when the explicit purpose of Congress in the IRA was to terminate the allotment process and discourage individual ownership of trust land and to encourage tribal ownership and consolidated use of all trust land? How can such differing treatment by any stretch of the imagination be called "rational" when Interior officials, including the Commissioner of Indian Affairs, Collier, who helped draft the IRA legislation, unequivocally assured Congress and the tribes that the tax free status would extend to all lands and economic units administered under the IRA? It is clear that not only is such differing treatment irrational but it was simply not within the intent of Congress.

No sane reason can be advanced for isolating a noncompetent Indian's income derived from his permissive use of trust land and holding that such income, uniquely, is taxable. Such a singling out of this type of income not only contravenes explicit Congressional and Federal policy but results in a disruptive patch work tax structure

which will substantially inhibit the economical administration and use of trust land by noncompetent Indians.

If the majority opinion of the Ninth Circuit stands, tribes will be forced into other methods of gaining optimum use out of the trust lands, which will ultimately prove less economical for the tribes. Thus the Congressional intent of the IRA will be emasculated.

Futhermore, the logic of the Internal Revenue Service seems faulty. If the precedent of *United States v. Anderson* is allowed to stand, Anderson can buy hay grown on trust land other than his own, feed it to his cattle on his own allotment, and thus any profit would be tax exempt. However, if Anderson pastures his cattle on the grazing units consisting of the trust land of others, a practice more economical, as well as being sound ranching procedure, any profit will be taxable. This rule of law, if allowed to stand, will be irrational, arbitrary, and absurd.

It seems clear that the most rational way to gain the optimum use of the trust lands is to administer them in the way that has been set by regulation. Since tax exemptions for Indians based on income derived from trust land were crucial to the IRA's admitted policy promoting "eventual economic independence", the only reasonable conclusion is that the tax exemption applies to the entire unified operation under the IRA.

## Conclusion

Circuit Judge Ferguson was therefore correct when, in his dissenting opinion, he noted that cases involving a noncompetent Indian's income arising directly from his use of trust land are not to be viewed as ordinary tax cases. Judge Ferguson recognized, as the foregoing analysis has shown, that tax exemptions in such cases may be found by implication and by reference to Congressional policy. As Judge Ferguson stated, the majority's opinion fails to recognize that Courts must

interpret Federal statutes and policies in a manner which does not thwart the intent of Congress. *United States v. Anderson* 625 F. 2d 910, 918 (1980). When we consider the question of tax exemption of income from Indian lands, "(w)e are dealing not with a word, nor with an act, but with a course of history. . . " (Dissenting opinion of Justice Murphy in *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 623 (1943).

Since the majority's opinion herein fails to apply the proper rules of construction set forth by the Supreme Court in *Squire v. Capoeman, Supra,* and since the taxation of Anderson's income as sanctioned by the majority, contravenes federal policy and violates the equal protection component of the Fifth Amendment, it is respectfully urged that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted this 24th day of December, 1980.

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